Report to the Washington Department of Ecology

Westside Stormwater Group Chapter

Version 1.0 for WSG discussion on October 1, 2003

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I. Advisory Group Composition and Process Overview

II. Areas being Regulated under Municipal Stormwater Permits (9-10-03)

Background

This discussion pertains to the issue of *areas being regulated by National Pollution Discharge Elimination System (NPDES) permits under phases one and two of the federal NPDES permit program as they relate to municipal borders.* The Clean Water Act regulations at [Phase I cite] and 40CFR 122.32 describe the specific situations under which municipally owned Separate Storm Sewer Systems (MS4s) are required to obtain coverage under an NPDES permit for stormwater discharges. The Phase I permit requirements apply to large and medium-sized MS4s that meet either of the following two requirements.

- The MS4 is located in an incorporated place with a population over 100,000 (as recorded in the 1990 census). The permit applies to the entire city.
- The MS4 serves unincorporated areas in a county that had a population of at least 100,000 residents at the time of the 1990 census. Only the unincorporated portion of the county must have permit coverage.

The designation happened only once; no new "Phase I" municipalities will be identified.

Under the NPDES Phase II regulations (governing smaller municipalities), only the portion of a municipal separate stormwater system (MS4) that is located within a census-defined urbanized area (i.e., population density greater than 1000 individuals per square mile) is regulated. Ecology is granted the authority to designate additional MS4s for inclusion in the Phase II permit, based on explicit state-defined criteria, possibly to include: discharges to sensitive waters; high growth or growth potential; high population density; or contiguity to urbanized areas[1]. Ecology can also waive requirements for municipalities meeting certain requirements.

The State Water Pollution Control Act Chapter 90.48.030 RCW gives Ecology jurisdiction to control and prevent pollution of waters of the state.

Discussion

The federal NPDES regulations rely on census-generated population data to trigger coverage under the MS4 permits but then set the areas of coverage according to municipal boundaries (i.e., city and county limits). The WSG observes, however, that basic hydrology does not follow political boundaries. WSG participants note that the

[1] These criteria are mentioned as guidance in the NPDES regulations at CFR122.35(b)(1)(ii). Washington has not yet set its criteria.

federal regulations exclude from permit coverage several portions of the state, including and perhaps most notably, urban growth area (UGAs) that are slated for further development under the State's Growth Management Act. According to maps prepared for the WSG by the Department of Ecology, large portions of the UGAs in western Washington fall outside (but adjacent to) the areas of permit coverage. Other gaps in coverage, such as small municipalities located in counties that are not covered under Phase I or II permits, may also exist and warrant coverage.

Several Phase II jurisdictions participating on the WSG indicate that they would establish a stormwater management program across their entire jurisdictions, including areas outside the census-defined urbanized areas but located within city or county limits. Others note that the use of Washington state waters is not defined by residence—the waters are available to all citizens and all citizens should expect high-quality waters.

WSG members suggest the following "alternatives" for addressing the issue of what areas to cover under stormwater permits issued by the Department of Ecology.

Alternatives

1. **Provide permit coverage throughout a qualifying MS4's area, not just those portions that meet the census-defined "urbanized areas" criteria.**

Arguments for:

- *Consistency*: Municipalities that provide consistent coverage throughout their jurisdictions will be more likely to meet permit limits.

Arguments against:

2. **Cover full geographic extent of qualifying municipalities plus adjacent urban growth areas in an equivalent manner through Phase II and Phase I reissued permits.**

Arguments for:

- *Technological Efficiency*—It is more efficient and cost-effective to implement stormwater technologies during new development than to retrofit existing systems to address ongoing problems. Including smaller municipalities that do not yet meet population thresholds helps those jurisdictions avoid retrofit expenses that will arise once they cross the population threshold.
- *Continuity/Practicality* —This alternative supports standardizing development standards throughout a jurisdiction.
- *Environmental benefit*—Preventing water quality degradation is preferable from an environmental standpoint than restoring or enhancing water quality (e.g., by retrofitting developed areas). Thus, it makes sense to proactively address less developed areas such as UGAs as they are developed.

- *Consistency/equity*— Development fees/other costs are likely higher in jurisdictions subject to stormwater regulation. To avoid these fees, development pressures may intensify in areas not covered under Phase I or II permits, such as UGAs. Over time, then, the UGAs will meet census-defined "urbanized area" criteria and be subject to Phase II requirements. Including UGAs in the Phase II designation will help moderate development pressures on UGAs and other undeveloped areas.
- *Leverage fees*—Fees from new development can be leveraged to offset costs of managing stormwater in urbanized areas.

Arguments against:

- *Cross-jurisdictional consistency*—Municipalities have no authority to regulate areas outside their city or county's limits. As a result, there may still be inconsistency across jurisdictions.
- *Flexibility needed*—Managing larger geographic areas will require greater flexibility on all parties' parts and may necessitate development of a more complex permit. Compliance with regulations may vary.
- *Special Purpose Districts*—Special Purpose Districts may still pose a challenge, especially if their unmanaged (or improperly managed) discharges flow into a municipal facility for treatment and are then discharged along with other municipal stormwater flows. [See Section X for a discussion of Special Purpose Districts.]
- *Ecology's authority under the Clean Water Act to expand coverage outside "urbanized areas"*—Although Ecology can require coverage of additional MS4s under NPDES Phase II, it can only do so if those MS4s meet Ecology's criteria (as yet undetermined). Ecology lacks stormwater data for many MS4s found in UGAs and may be challenged to make a case to include additional locations.

3. Focus stormwater permit implementation especially on urbanizing areas (rather than heavily urbanized areas).

Arguments for:

- *Environmental benefit*—Water quality protection is superior to water quality restoration. Protection opportunities are greatest in less-developed areas.
- *Leverage fees*—Fees from new development can be leveraged to offset costs of managing stormwater in urbanized areas.

Arguments against:

- *Opportunities in developed areas*—Significant new development may still occur in "urbanized areas." Opportunities to positively impact development decisions at these sites may be lost if municipalities are focused elsewhere.

4. Consider requiring permits for MS4s located adjacent to sensitive waterbodies.

Arguments for:

- *Environmental benefit*—Sensitive waterbodies have special ecological importance and deserve attention and protection under regulatory programs. Taking a proactive approach in their protection helps municipalities avoid the costs of restoring (or trying to restore) these natural areas.

5. Develop MS4 permits on a watershed basis, to ensure consistency among all jurisdictions discharging stormwater to a waterbody.

Arguments for:

- *Cross-jurisdictional consistency*—Because municipalities lack authority to regulate areas outside their city or county's limits, this alternative can bring about greater regional consistency if jurisdictions agree to manage their stormwater in an equivalent manner.

Arguments against:

- *Differing objectives*—Cities and counties often have different water quality (and development) objectives. Political pressures may overwhelm jurisdictions' ability to coordinate development and maintenance standards. Standardizing to the "lowest common denominator" will not serve environmental objectives.

III. Types of Discharges regulated under MS4 Permits (9-10-03)

Background

The Federal Phase I and II NPDES stormwater rules state that operators of MS4 systems must obtain an NPDES permit for discharges of stormwater to surface waters (except under certain, defined circumstances). According to the regulations at 40 CFR 122.26(b)(8), a municipal separate storm system is defined as "a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains." As a rule, streams, lakes, and other natural waterways are not part of the MS4 system.

The State Water Pollution Control Act (at Section 90.48.030 RCW) grants Ecology authority to control and prevent the pollution of <u>all</u> waters of the state and further requires counties and municipalities to obtain a permit to dispose of wastes into the waters of the state. The state permit, therefore, covers discharges of wastes directly to surface waters.

Discussion

This discussion addresses primarily the question of <u>whether Phase II permit requirements should cover direct discharges to surface waters</u>. WSG members observe that direct discharges to surface waters (e.g., from commercial properties into adjacent streams) are not currently a major source of stormwater runoff in Washington State but may become

more important over time. Some members observe that stormwater and non-stormwater runoff can mix in streams and creeks that discharge into larger waterbodies. In some jurisdictions, for example, direct discharges may travel through municipalities' pumping stations, be combined with traditional municipal discharges, and may ultimately contribute to an excursion above water quality standards. While WSG members are concerned about such discharges and their impact on water quality, they are not certain that municipalities should be responsible for regulation of these direct (often non-stormwater) discharges.

WSG members identify the following alternatives for addressing the types of discharges to be covered under municipal stormwater permits.

Alternatives

1. Apply the MS4 permit to all discharges, including direct discharges.

Arguments for:

- *Enhanced water quality*—Managing the full range of stormwater discharges helps minimize the cumulative water quality impact of stormwater and improves the likelihood of maintaining a receiving water's compliance with applicable water quality standards. If a water quality standard violation occurs and a total maximum daily load (TMDL) is required to come back into compliance with water quality standards, the municipality will likely be asked to take significant steps to come back into compliance.
- *Permit coverage*—Stormwater runoff from commercial and residential properties can only be addressed via municipal permits. Stormwater runoff from industrial and construction activities is addressed under separate permits.

Arguments against:

- *Legal authority*—Ecology does not have the legal authority to compel municipalities to regulate direct discharges.
- *Multiple points of compliance*—Municipalities responsible for direct discharges to surface waters become responsible for assuring multiple points of compliance. The resulting regulatory matrix can be quite complex.
- *Legal vulnerability regarding antidegradation*—Municipalities are unsure how to assure compliance with antidegradation requirements and may be unwilling to be held accountable for others' discharges. To limit their own legal liability, municipalities may be compelled to require landowners to apply for permit coverage under 90.48 RCW.
- *Legal vulnerability*—Permits should not create local liability not otherwise existing under law (i.e., create third party legal standing under a state law).
- *Determining responsibility*—Monitoring to determine which direct dischargers are responsible for stormwater pollution is expensive.
- *Nonpoint sources*—At times, nonpoint sources (or other non-stormwater discharges such as runoff from lawn watering) may cause water quality

problems in a receiving water. These sources are not covered under MS4 permits. Municipal stormwater operators have no control over such sources.

2. **Hold municipalities accountable only for discharges to their MS4 system and not for others' direct discharges to waterbodies. Municipalities may help identify/locate direct dischargers but will look to Ecology to regulate direct discharges to waterbodies.**

Arguments for:

- *Limit legal liability*—Municipalities will not be held accountable for discharges over which they have little or no control.

Arguments against:

- *Ecology enforcement capabilities*—Ecology may not have adequate staff to identify and take enforcement actions against direct dischargers.
- *Water quality violations*—Water quality violations may occur more frequently as unregulated sources cause greater pollutant loading. Ultimately, this may cause an impairment of the waterway. The municipality may then be compelled under the Clean Water Act to take additional, costly steps to limit their stormwater discharges.

IV. Coverage of Discharges to Groundwater (9-10-03)

Background

The federal NPDES regulations describing Phases I and II of the municipal permit call for the management of all municipal stormwater discharges to surface waters. EPA has also stated that discharges of pollutants to surface waters via a hydrologic connection provided by groundwater recharge of surface waters are subject to NPDES permitting requirements. Under the federal regulations, direct discharges to groundwater are not subject to NPDES regulation. The Underground Injection Control (UIC) program established under the federal Safe Drinking Water Act also provides regulatory coverage for many (but not all) stormwater discharges to groundwater. The UIC program requires that injection wells[2] be registered and meet "a non-endangerment standard" to protect underground sources of drinking water. (Note: Unlike the federal NPDES requirements, the Safe Drinking Water Act does not contain provisions for enforcement by third party lawsuits.)

Section 90.48.020 RCW defines waters of Washington state to include lakes, rivers, ponds, streams, underground waters, salt waters, and all surface waters and watercourses within the state's boundaries (emphasis added). Section 90.48.030RCW gives Ecology jurisdiction to control and prevent pollution of all waters of the state. State waste

[2] Injection wells include man-made or improved holes in the ground that are deeper than they are wide at the ground surface, or improved sinkholes or subsurface fluid distribution systems

discharge permits are required for discharges to waters of the state by commercial, industrial, or municipal/public operations.

The Washington Phase I municipal stormwater permit required qualifying jurisdictions to manage all of their MS4 discharges, including discharges to groundwater. Discharges to surface water are regulated under the NPDES and state permit authorities; discharges to groundwater are regulated only under state authorities. Phase I municipalities were not required to take action on groundwater discharges for the first three years of their permit.

Discussion

WSG members acknowledge the dynamic tension between the NPDES requirements (focus on surface water) and those established in the state Water Pollution Control Act (protect all waters, including groundwater) and appreciate the impact of groundwater-borne pollutants on the state's waters, including sensitive drinking water aquifers. At the same time, however, several WSG members express concerns about including discharges to groundwater in the NPDES permit because doing so compels municipalities to monitor and regulate discharges to groundwater (which are often difficult to locate or manage and do not travel through the MS4 system) and raises the specter of a third party lawsuit for failure to do so.

WSG members considered the following alternatives related to regulating stormwater discharges to groundwater.

Alternatives

1. Issue a combined NPDES/State Waste Discharge permit for municipal stormwater and require the same programmatic activities for discharges to groundwater and surface water.

Arguments for:

- *State legal requirements*—This option addresses state requirements to limit discharge of pollutants to all waters of the state.
- *Comprehensive program*—Managing stormwater discharges to groundwater provides for the development of a comprehensive stormwater management program and the control of all stormwater sources, not just discharges to surface waters. This option provides for control of all groundwater discharges (not just those regulated under the UIC program).
- *Permit administration*—Administering a combined permit is less burdensome than administering two separate permits.
- *Permit shield*—Although inclusion of discharges to groundwater in an NPDES permit may subject parties to additional third party litigation (which is allowable under the federal requirements but not the state Water Pollution Control Act), the permit can also shield the permit holder from prosecution if it clarifies that discharges to groundwater are subject only to state requirements.

Arguments against:

- *Federal nexus*—NPDES requirements do not address direct discharge of stormwater to groundwater.
- *Loop-hole*: The municipal stormwater pemit should not be called upon to fix legal/statutory problems that arise from differences between UIC, state, and federal water quality protection requirements.
- *State agency primacy/coordination*—The Washington Department of Health, not Ecology, has primary responsibility for implementing and assuring compliance with the Safe Drinking Water Act. Ecology will have to coordinate closely with the Department of Health to implement Phase II requirements for discharges to groundwater.
- *Financial hardship*—Many Phase II municipalities lack resources to incorporate discharges to groundwater in their stormwater management programs.
- *Duplication*—Municipal infiltration facilities already regulated under the UIC program may be subject to duplicative requirements if also made subject to NPDES regulations.
- *Legal vulnerability*—Permits should not create local liability not otherwise existing under law (i.e., create third party legal standing under a state law).

2. Issue a combined NPDES/State Waste Discharge permit for Phase II municipal stormwater and require that municipalities confirm qualitatively that discharges to groundwater meet the non-endangerment standard. Municipal UIC owners would not be required to implement all of the programmatic activities described in the federal Phase II regulations.

Arguments against:

- *Financial hardship*—Development of services to meet federal requirements is more costly.
- *Coverage*—Not all discharges to groundwater are collected/transported via UIC facilities. Under this option, discharges to groundwater via non-UIC conduits (e.g., infiltration through ponds or basins) lack permit coverage/oversight.

3. Issue separate groundwater and surface water stormwater permits.

Arguments for:

Arguments against:

- *Liability*—This approach limits municipalities vulnerability to third party lawsuits under the Clean Water Act.
- *Administrative burden*—This approach may increase parties' administrative burden by requiring the development and maintenance of two separate permits.

3. **Issue an NPDES Phase II municipal stormwater permit that applies only to discharges to surface waters.**

Arguments for:

- *Limit legal vulnerability*—Issuing a stormwater permit limited to discharges to surface water limits local liability to that which is created by federal law.
- *Limit transfer of responsibility*—The permit should not transfer oversight/enforcement responsibilities of one entity (e.g., Department of Health oversight of failing septic systems) to another (a stormwater manager).

Arguments against:

- *Legality*—This option does not fully address Ecology's obligation under the State Water Pollution Control Act to secure and retain high quality for all waters of the state (90.48.010 RCW).

V. Level of Effort required of Municipalities to Satisfy Permit Requirements (9-17-03)

Background

The federal regulations at 40 CFR 122.34(b) call for operators of Phase II regulated MS4 to include "six minimum control measures" (or six minimum measures) in theirstormwater management program to meet the conditions of the NPDES permit. The six minimum measures are generally satisfied through implementation of Best Management Practices (BMPs). The regulations at 40 CFR 122.34(e)(1) direct MS4 operators to comply with "any more stringent effluent limitations, including permit requirements that modify, or are in addition to, the minimum control measures based on an approved total maximum daily load (TMDL)." MS4 operators are also required (40 CFR 122.34(g)(1) to evaluate program compliance, the effectiveness of applied BMPs, and progress toward identified measurable goals. For purposes of WSG discussions, these requirements are called the "six plus two" minimum requirements.

Discussion

All WSG members acknowledge and support implementation of the six plus two minimum requirements through an NPDES permit. Some believe that the permit requirements should be limited to these measures, in keeping with the regulations. Others suggest that municipal stormwater programs can (and should) do more to protect water quality through the stormwater permit. In fact, several Phase II municipal representatives on the WSG report that their programs already meet (and in many cases, exceed) the six plus two minimum requirements (based on their own or a consultant's analysis).

In contrast, other municipal stormwater program managers doubt that they can implement all six minimum measures in a timely fashion. In some cases, their programs lack needed resources (funding or staffing); in others, delays are anticipated because elected officials

do not fully support or understand the program's goals and are unwilling to issue city or county ordinances or policies that are essential to fully implement the requirements. [Need to incorporate Dave Tucker's/Paul Bucich's?] idea re: vesting] The net result, WSG members agree, is that the quality, maturity, and capacity of municipal stormwater program vary widely across western Washington. The WSG, generally, is interested in seeing the permit "level the playing field" somewhat, so that all municipalities are compelled to meet a basic level of program performance. WSG members believe this approach may help protect overall water quality and generally limit the pollution being discharged to Washington's waters.

Several WSG members express hope that Ecology can be flexible in the way it sets permit requirements; others emphasize the importance of providing clear direction (whether in the permit itself or through guidance). This guidance should identify the performance standard but should not direct municipalities to take specific steps to reach those standards. Of specific note, some WSG members urge Ecology to consider using biological indicators (e.g., macroinvertebrate inventories) in its assessment of the sufficiency of a specific municipal stormwater management program.

Alternatives

1. **Adhere to the "six plus two" minimum requirements.** Any additional measures should be implemented entirely at a municipality's discretion.

Arguments for:

- *Clarity*—This approach provides very clear direction to municipalities by focusing on the requirements laid out in the regulations (and supporting guidance materials).
- *Reasonable*—Implementing the "six plus two" requirements will be challenging for many Phase II municipalities, especially those with less robust programs. Requiring municipalities to incorporate additional elements into their permits might cause jurisdictions to divert program funds (and shift program priorities) to meet regulatory requirements.
- *Political support*—Establishing state-level specific minimum requirements helps stormwater program managers and utilities build the case for sufficient program funding.
- *Compliance determination*—This approach enables Ecology and others to more directly determine whether municipalities are complying with permit requirements.
- *Concern about litigation*—Municipalities do not want to be "held to" permit standards that they may be unable to meet, thereby opening their programs/jurisdictions to third party litigation under the Clean Water Act citizen suit provision.
- *Equity*—Adhering to the "six plus two" minimum requirements establishes an equitable program baseline among Phase II communities.

Arguments against:

- *Environmental Benefit*—A number of western Washington jurisdictions have already demonstrated an ability and willingness to move well beyond the "six plus two" minimum control measures. Requiring fewer actions by the Phase II jurisdictions cause progressive municipalities to scale back their efforts (which, in turn, lessens the environmental benefits of their programs).
- *Political will*—Limiting the NPDES permit to the federally-mandated "six plus two"minimum measures may undercut local political support for program actions beyond the minimum requirements.
- *Capital projects*—The federally mandated minimum control measures focus mainly on actions to be taken by municipalities undergoing extensive development/redevelopment. Activities for capital projects, such as MS4 retrofits, are insufficiently addressed via the "six plus two" minimum measures and need to be considered in the permit.

2. **Establish a tiered permit.** All municipalities should be expected to implement a basic program that adheres to the "six plus two" minimum requirements. Over time, as their programs mature and program capacity increases—and their NPDES permits are reissued, municipalities should introduce additional program elements. [Note: Determination to increase requirements may also be influenced by other criteria such as presence of impaired or highly sensitive waters in MS4's area of coverage.]

Arguments for:

- Reasonable—This option acknowledges that municipalities are at different stages of program maturity (whether due to availability of resources, size of staff, program age) and relies the "six plus two" as a starting point. This option further recognizes that as a jurisdiction's stormwater management program evolves, it is likely able to incorporate additional functions and features.

Arguments against:

- *Determination of readiness*—This option does not (yet) clarify on what basis (or within what timeframe) a program is deemed ready to incorporate new permit elements. Would the permit require modification or can it be written to accommodate an adaptive/iterative approach?

3. **Equivalent permit standard/criteria across western Washington.** Municipalities should be given complete flexibility to implement their programs (including activities under the six plus two minimum measures) in whatever manner they choose.

Arguments for:

- *Municipal expertise*—Municipal stormwater program managers are best-equipped to establish a workable, successful stormwater management program to implement in their jurisdiction(s).
- *Permit supports stormwater management strategy*—The permitholder should focus on designing a stormwater management program to achieve desired

outcomes. The permit should support implementation of a stormwater management program; it should not drive it.

Arguments against:

- *Compliance determination*—This approach makes it challenging for Ecology and others to determine whether municipalities are complying with permit requirements.
- *Expense to State*—This approach would be very expensive for the State. It would require additional staff at Ecology, to review a wide variety of permit applications.

4. **Focus on desired water quality outcomes, and use the permit to support their efforts to implement the program (rather than establishing a program to implement the permit).** Each jurisdiction should determine what actions to take (within the framework of the six plus two measures) to best implement its strategy.

[Q: for WSG: Is this the same as #3?]

VI. Defining "Maximum Extent Practicable" (9-17-03)

Background

[Regulatory background—industrial stormwater (CWA 402(p) + 301; compliance with water quality and technologically-based permit limits; Phase I muni regs; Phase II regs (40 CFR 122.34(d)

90.48

AZ case

EPA policy documents]

Discussion

In concert with its analysis of the **"**six plus two**"** minimum control measures, the WSG considered what is meant by "Maximum Extent Practicable." Certain members emphasize "maximum" while others focus on the meaning of the term "practicable." Some WSG members assert that defining MEP is a federal issue; others look to the state for direction. Certain members advocate for defining MEP as "meets water quality standards" and note that the state Water Pollution Control Act obliges Ecology to require compliance with water quality standards. Others assert that the compliance standard for municipal stormwater discharges should be set through the implementation of Best Management Practices (BMPs) and reflect a "best effort" approach. Some recommend that Ecology consult the Puget Sound Management Plan to determine what BMPS are feasible for municipalities to implement.

Certain WSG members caution that MEP must be considered in the context of other state and local laws or regulations, some of which may directly limit jurisdictions' abilities to address existing stormwater problems. These individuals generally support defining MEP in a way that allows for jurisdictional differences. This approach recognizes that programs are at different stages of maturation and considers communities' specific interests or regulatory frameworks). Some WSG members suggest that MEP recognize cost as a limiting factor (especially for smaller programs); others believe that municipalities that have an ability to raise funds (e.g., those with stormwater utilities) should be expected to do so. Certain members recommend setting MEP at the point at which technology can deliver benefits in reasonable proportion to its costs (in other words, at the point at which the cost of an action or solution does not outweigh its benefits).

Alternatives

1. **Define MEP = meets water quality standards.**

Arguments for:

- *Environmental benefit*—Setting MEP at water quality standards provides for maximal water quality benefit.
- *Clarity*—Defining MEP to equal "meets water quality standards" is clear and unambiguous. This approach also helps Ecology determine a jurisdiction's compliance with permit requirements.
- *Equity*—Other stormwater permits (e.g., industrial) require permitholders to comply with water quality standards.
- *State legal requirements*—State law requires Ecology to maintain the highest purity of all waters of the state. This is often interpreted to call for compliance with applicable water quality standards through permits (and other mechanisms.
- *Federal legal requirements*—Other federal requirements (e.g., TMDLs) require that receiving waters attain water quality standards. Therefore, even if municipal stormwater permit regulations do not call for compliance with water quality standards, stormwater discharges may ultimately be expected to meet applicable water quality standards through implementation of a TMDL or other water quality management plan. Working proactively to meet water quality standards helps avoid stormwater-induced water quality violations.

Arguments against:

- *State law conflicts/limits*—Jurisdictions are bounded under state law by the vesting of certain rights. In certain cases, the vesting of these rights may prevent municipalities from taking actions necessary to meet water quality standards.
- *Program delegation*—If compliance with water quality standards is established as the MEP standard and Ecology is unable to enforce this standard, the agency may find itself in danger of losing program delegation (for failure to assure full implementation of NPDES requirements).

- *Legal precedent*—The federal courts recently affirmed that federal law does not require municipal stormwater permits to comply with water quality standards.

2. **Define MEP elastically, recognizing that it will likely vary by jurisdiction.** Possibly, as part of this approach, define MEP through guidance and not in the permit itself.

Arguments for:

- *Site-specific considerations*—Allowing for a flexible definition of MEP allows Ecology to consider a set of variables (jurisdiction's size, ability to perform, ability to pay, proximity to sensitive waters, etc.) that affect jurisdictions' abilities to take actions under their stormwater management programs.
- *Public input*—This approach allows the citizens of a particular jurisdiction to influence the types of stormwater management activities set in motion through the permit.
- *BMPs Ill-defined*—MEP has not yet been clearly defined, even at the federal level. Ultimately, the courts will determine what MEP means.

Arguments against:

- *Public good*—Waters of the state belong to all citizens of the state, not to an individual jurisdiction.
- *Administrative burden*—Ecology lacks capacity to determine individual jurisdictions' ability to implement stormwater management techniques/actions. Overseeing and assuring jurisdictions' compliance with applicable requirements may prove labor-intensive for Ecology, especially in the context of a general NPDES permit.

3. **Ecology should develop a tiered definition of MEP**, based on the size of the jurisdiction and other considerations.

Arguments for:

- *Continual improvement*—This approach encourages jurisdictions to regularly update and strengthen their program but provides some firm guideposts/direction.

Arguments against:

- *Compliance determination*—Determining a jurisdiction's compliance with applicable requirements may be challenging if the requirements are in constant flux.

4. **MEP should be set as a BMP standard**. Ecology should be able to articulate criteria to judge the sufficiency of selected BMPs (the point at which costs and benefits of a selected approach are in direct relationship) but should not dictate which BMPs are to be implemented.

Arguments against:

- *Regulatory direction*—The Phase II federal regulations direct jurisdictions to look beyond BMPs when implementing permit requirements.
- *Qualifying BMPs*—It is unclear what activities qualify as BMPs in the context of stormwater management. Is basin planning a BMP?
- *Cost-benefit requirement*—Requiring a cost-benefit analysis prior to implementation of any given BMP is time-consuming and resource-intensive.

5. **The definition of MEP should consider whether an action is technically sound, financially responsible, and environmentally beneficial.**

Arguments for:

- *Feasibility*—What is possible for one jurisdiction to accomplish (from a financial standpoint) may be beyond what another can achieve. This approach acknowledges that dichotomy.

6. **MEP = AKART ("all known available and reasonable technologies").** The AKART standard is set by the Water Pollution Control Act and covers new development, redevelopment, and retrofitting existing facilities.

Arguments for:

- *Consistency*—Tying MEP to AKART helps strengthen the connections between Clean Water Act and state Water Pollution Control Act requirements.
- *Structural/non-Structural*—Defining MEP as AKART clarifies that both structural and non-structural BMPs are appropriate means of managing stormwater pollution.
- *Retrofit*—Establishing AKART as the definition for MEP compels jurisdictions to address stormwater through retrofits of existing facilities.

Arguments against:

- *Impractical*—AKART sets a standard that is highly challenging to meet for purposes of stormwater management. Retrofitting existing facilities to meet new design standards can be very expensive and may, at times, run contrary to protections granted elsewhere under state law. Capital expenditures should not be included in expectations of MEP because sufficient funding cannot be assured.
- *GMA*—Establishing MEP = AKART runs counter to the Growth Management Act.
- *Legal vulnerability*—Stormwater permits should not create local liability that does not exist otherwise under federal law (i.e., create third party legal standing under a state law). AKART is broader than MEP and should not be cited as part of the definition.

VII. Special Purpose Districts (9-17-03)

Background

As part of its deliberations, the WSG considered the unique challenge posed by special purpose districts. "Special districts" are described in the Phase I regulations in conjunction with the definition of an MS4. At 40 CFR 122.26(b)(8)(i), an MS4 is described in part as being "Owned or operated by a State, city, borough, county parish, district, association, or other public body…having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district…" More than seventy Washington state entities, including drainage districts, flood control districts, ports, universities and school districts, may qualify as special districts in the context of stormwater management. These entities are governed by a separate regulatory system set up by state law.

Discussion

The WSG recognizes that although special purpose districts are covered under the Phase II municipal stormwater permitting requirements, they generally lack enforcement authorities (and resources) to implement a stormwater management program. WSG members acknowledge that many existing special purpose districts in Washington state are already subject to local stormwater and/or related building design ordinances, pay stormwater utility fees, and/or are regulated under an industrial stormwater permit. The WSG also acknowledges that stormwater (and other runoff) from outside the special purpose district can and may co-mingle in the special purpose district's MS4, posing a special challenge to stormwater management.

Options

1. **Regulate special purpose districts through the municipalities. To enact this, generally, municipalities and special purpose districts would enter into an interlocal agreement establishing a "co-permittee" relationship.**

Arguments for:

- *Municipal program in place*—Municipalities are already expending resources to establish a sufficient stormwater management program. In consideration of this and the overlapping nature of their stormwater flows, it makes sense for special purpose districts to seek coverage under the municipal stormwater permit.
- *Funding source*—Covering the special purpose district's MS4 under the municipal system can, under certain circumstances, contribute significant funds to the municipality's stormwater management program.
- *Ecology staffing*—Under this option, Ecology would be spared from having to develop and administer a separate stormwater permit (or permits) to cover applicable special purpose districts.

Arguments against:

- *Co-permittee status*—WSG Phase I municipal representatives are troubled by this option because it holds municipalities accountable (through an enforceable permit) for another governmental entity's activities and actions.
- *Accountability*—Special purpose districts are governed by the state and cannot necessarily be compelled by the municipality to take specific action. It is important that Ecology maintain a direct connection to these districts and assert its authority where the district does not conform to Clean Water Act requirements.

2. **Do not regulate special purpose districts through municipal stormwater permits.** If Ecology is obliged to obligate these districts, it should do so directly.

Arguments for:

- *Legal clarity*—Addressing special purpose districts apart from municipalities helps clarify the boundaries of different parties' liability under specific permits.

Arguments against:

- *Workload*—Ecology lacks sufficient staff resources to issue NPDES permits to each special purpose districts. Furthermore, Ecology lacks resources to assure their compliance with permit requirements.